

**A.M.F. Bowling Company, Inc. and United Steelworkers of America, AFL-CIO, CLC, District 4.** Cases 3-CA-13625 and 3-CA-13982

August 31, 1994

**SUPPLEMENTAL DECISION AND ORDER**

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

This case is on remand from the United States Court of Appeals for the Fourth Circuit. The court asked the Board to determine whether the Respondent's overall behavior during collective-bargaining negotiations constituted bad-faith bargaining, and whether the Respondent's declaration of impasse was premature.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The complaint alleged, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith and by the following postdeclaration-of-impasse conduct: withdrawing recognition from the Union, making unilateral changes, dealing directly with unit employees by encouraging and forming employee grievance committees, refusing to provide, and delaying in providing, requested pension information, refusing to bargain with the Union unless the Union dramatically altered its position, and summarily rejecting the Union's offer, at the final bargaining session, to accept economic reductions.

The judge found that the Respondent's overall conduct during negotiations, including its failure to produce wage surveys it conducted to justify its demands for economic concessions, constituted bad-faith bargaining. The judge further found that even if the Respondent had bargained in good faith, the Respond-

ent's declaration of impasse was premature because collective bargaining was not sufficiently exhausted.

The Board in its original decision did not pass on the judge's finding that the Respondent engaged in general bad-faith bargaining during contract negotiations with the Union. Rather, the Board concluded that the Respondent's failure to provide the Union with its wage surveys violated Section 8(a)(5) and prevented a valid bargaining impasse from occurring. Relying on the absence of a valid impasse, the Board found that the Respondent further violated Section 8(a)(5) by engaging in the additional postimpasse conduct described above.

On review, the court reversed the Board's finding that the Respondent's failure to produce the wage surveys constituted an unfair labor practice, holding that the Union's request for the Respondent to open its books and to justify its position was a "general request" that did not put the Respondent on notice that the Union sought the wage charts. The court remanded the case, however, for the Board to review "the ALJ's determination that the impasse resulted from general bad-faith bargaining and that it was prematurely declared." 977 F.2d at 147.<sup>2</sup>

The Board has accepted the court's remand and analyzes the relevant issues below. For the reasons set forth below, we reverse the judge's finding that the Respondent engaged in bad-faith bargaining, but we find, in agreement with the judge, that there was no valid impasse when the Respondent implemented the economic terms of its January 14, 1987 offer. Accordingly, we reaffirm our finding that the Respondent violated Section 8(a)(5) by its various unilateral actions taken subsequent to the alleged impasse.

The relevant facts, based on both the credited testimony and the uncontroverted evidence in the record, are as follows.<sup>3</sup> The Respondent manufactures and

<sup>1</sup> On May 29, 1991, the National Labor Relations Board issued its Decision and Order in this proceeding in which it found that the Respondent, inter alia, bargained in bad faith by failing to provide the Union with wage surveys it conducted to justify the necessity for the substantial economic reductions contained in its bargaining proposals and, therefore, that the parties did not reach a valid impasse. See 303 NLRB 167. The Respondent filed with the court a petition for review of this portion of the Board's Order, and the Board filed a cross-petition for enforcement.

In an opinion dated October 5, 1992, the court reversed the Board on this issue and remanded the case to the Board to consider other issues, described below, that the Board had not addressed because of its disposition of the wage surveys issue. *A.M.F. Bowling Co. v. NLRB*, 977 F.2d 141 (4th Cir. 1992).

By letter dated January 13, 1993, the Board notified the parties that it had accepted the court's remand and that statements of position could be filed with respect to the issues raised by the remand. The General Counsel, the Charging Party, and the Respondent each filed statements of position with the Board.

We deny the Respondent's motion to correct the record to include copies of its appellate briefs. We also deny the Charging Party's motion to supplement the record with the docketing statement that the Respondent filed with the court.

<sup>2</sup> The court on review enforced the Board's finding that the Respondent violated Sec. 8(a)(1) by excluding unit employees from participating in its severance plan. This violation is no longer an issue in this proceeding. The court also enforced the Board's finding that the Respondent's proposal concerning the assignment of unit work to nonunit employees was a mandatory subject of bargaining and therefore that the Respondent could insist on this proposal. The court indicated, however, that the Board on remand could determine "whether AMF's overall behavior during the negotiations leading to the impasse on the unit-work proposal constituted bad-faith bargaining." 977 F.2d at 149.

<sup>3</sup> Our recitation of the facts does not depend on the testimony of Burtch, the Respondent's chief negotiator. The judge discredited Burtch generally, noting that he was particularly unimpressed with Burtch's demeanor. We do not view our decision reversing the judge's finding that the Respondent bargained in bad faith as a reversal of the judge's demeanor-based credibility resolutions. We find, however, that in making certain credibility resolutions against Burtch, the judge relied in substantial part on his improper subjective view of the Respondent's bargaining proposals, which is discussed more fully below. Thus, our assessment of the parties' conduct during negotiations is based on the record as a whole, including our

*Continued*

sells bowling lanes and equipment. About August 24, 1986, a group of private investors signed a purchase agreement to acquire the bowling division of A.M.F. from Minstar. As a condition of the purchase, the Respondent agreed to adopt all of Minstar's existing collective-bargaining agreements, including a contract with the Union, which was set to expire on December 8, 1986, covering about 75 production and maintenance employees at the Lowville, New York plant involved here.<sup>4</sup>

At the time of the purchase, Minstar's domestic manufacturing division also included a plant in Shelby, Ohio. During the summer of 1986, Minstar had negotiated a new collective-bargaining agreement with another labor organization representing the Shelby employees. The agreement provided for wage reductions of 24 percent and benefit reductions of 14 percent. Mallette, the general manager at the Lowville plant, testified that the Shelby concessions were common knowledge in the plant.

After purchasing A.M.F., the investors cut expenses by \$10 million. These cost-cutting measures included layoffs among the salaried, nonbargaining unit employees at the Lowville and Shelby plants. In late summer of 1986, the Respondent retained Jack Burtch, an attorney, to negotiate with the Union. On September 24, 1986, the Union notified the Respondent that it was terminating the existing agreement and requested bargaining.

The first bargaining session was held on December 3, 1986.<sup>5</sup> The Union's bargaining committee consisted of District Representative Prenatt, Local President Ritz, and a group of unit employees. Burtch, the chief negotiator for the Respondent, was assisted by General Manager Mallette and other company officials. The Union proposed a 2-year agreement with 8-percent wage increases each year and increased benefits.<sup>6</sup> Thereafter, Burtch told the Union that A.M.F. was a new and smaller company, and that the Respondent needed to be more competitive and would require economic concessions. The Respondent claimed that the wages at the Lowville plant were much higher than wages for comparable jobs in the area, and referred to manufacturing losses and the economic concessions that had been accepted at the Shelby plant. Stating that the new owners had taken over the business in November and had not yet reviewed either the contract or the operation of the business, Burtch requested that the

contract be extended. The parties agreed to a 30-day extension of the contract until January 8. Genovese, one of the Respondent's owners, testified that in November and December, the Respondent devised bargaining objectives rather than specifics.

Early in the second bargaining session on December 16, Burtch described cost-cutting measures that the new owners had implemented outside the unit, including layoffs at the Shelby and Lowville plants. The Respondent then presented a single language proposal to eliminate the Respondent's right to file a grievance. During this session, the Respondent agreed to several of the Union's noneconomic proposals.<sup>7</sup> During the afternoon, the Respondent presented its first economic proposal which, along the lines of the Shelby contract, sought a 24-percent wage reduction for unit employees in each of the 10 existing job grades. Regarding benefits, the Respondent's proposal stated: "Approximately 14% reduction in fringe benefits. Reduction can be achieved by higher deductibles, etc. Same vacation and holiday plan as salaried employees." When presenting this proposal, Burtch reiterated that the Respondent needed economic concessions in order to be competitive. Ritz counterproposed that the Union would reduce its wage proposal from an 8-percent increase the first year to a 6-percent increase, and suggested profit sharing. Burtch did not respond.

The Respondent's new owners, Genovese and Goodwin, toured the Lowville plant on December 23, reviewed the job grades and classifications for unit employees, and determined that the wage spread between the lowest and the highest grades was too compressed. Based on this conclusion, Genovese instructed Mallette to review the entire Lowville operation and to assign what he believed were fair market wage rates for the type of work being performed. Genovese and Goodwin met with Burtch on December 31 and again on January 2 to prepare a document outlining the Respondent's bargaining objectives.

The third bargaining session was held on January 6.<sup>8</sup> The Respondent presented its initial noneconomic bargaining proposals which, as found by the judge, sought significant modifications in the existing contract. The Respondent, *inter alia*, presented three proposals which, along with wage and benefit levels, were the focus of the remaining bargaining sessions. First, the Respondent proposed eliminating the contract's union-shop clause. Regarding this proposal, Burtch stated

finding that the judge improperly substituted his judgment for that of the Respondent in assessing the appropriateness of certain of the Respondent's bargaining proposals.

<sup>4</sup>The Union had maintained a stable bargaining relationship with the Respondent's predecessors for about 20 years at Lowville.

<sup>5</sup>All subsequent dates in December are in 1986. All other dates are in 1987 unless otherwise indicated.

<sup>6</sup>As found by the judge, the Union's proposed changes on non-economic subjects were minor.

<sup>7</sup>These proposals included clarification of the contract to note specifically the composition of the Union's bargaining committee, the provision of leave for volunteer firemen, assurance that the union president could observe the employees' exercise of bumping rights, specification of a funeral leave policy, and the provision of a bulletin board in plant 3.

<sup>8</sup>Mallette did not participate in any further negotiations, but was present at each of the caucuses held by the Respondent's bargaining representatives to discuss the negotiations.

that he came from a right-to-work state and had a philosophical belief against a union shop and that the owners felt that it was an employee's right to belong to a union or not.

Second, the Respondent sought to modify the existing contract's "bidding and bumping" provision, which specified that seniority governed, to provide that selection would be based on ability, as determined by the Company's judgment. The Respondent's proposal further stated that where the Company determined that ability was equal, seniority would govern, and that the Company's judgment was not subject to the grievance procedure. When questioned as to whether the Respondent explained why it wanted to make ability the primary criterion, Ritz stated that Burtch asserted that the owners had to run the business "the best possible way to make money." Ritz further testified that Burtch expressed concern that employees had bid on jobs and then disqualified themselves, thus causing chaos in the bidding process.

Third, the Respondent sought to change a provision in the existing contract that provided that "non-bargaining personnel" could perform unit work under five very limited conditions.<sup>9</sup> The Respondent proposed that, without limitation, "non-bargaining unit personnel (e.g., supervisors) may perform the work ordinarily performed by the employees covered by this agreement." Burtch testified that the language was designed to give the Respondent the flexibility to have supervisors step in on the production line in cases of absenteeism or trouble, but admitted that the provision as drafted extended beyond supervisors.<sup>10</sup>

Regarding benefits, Burtch proposed that employees contribute \$14 per month to the pension plan, and presented the Respondent's cost-shifting measures for health and medical insurance as well as the elimination of dental coverage. Ritz testified that Burtch did not provide an explanation of the proposal, a copy of the

pension plan, or pension information that the Union had previously requested.<sup>11</sup>

When bargaining resumed on the afternoon of January 6, the Union made clear that many of the Respondent's proposals were not acceptable. As detailed in the judge's decision, the Union accepted some of the Respondent's proposals, and offered compromise positions with respect to other proposals.<sup>12</sup> Ritz stated that the Union would consider accepting proposed benefit reductions if the Respondent would reconsider its position on wage reductions.

A Federal mediator was present when the parties met again on January 7. Burtch presented the wage proposal that Mallette had prepared during the Christmas break, which included new job classifications and increased the number of job grades from 10 to 16. The proposal did not include a term length.<sup>13</sup>

During a caucus, Ritz informed the mediator that the Union's position was that the Respondent's proposals on open shop, bidding and bumping,<sup>14</sup> and nonbargaining unit personnel performing bargaining unit work had been offered without sufficient explanation, and that, without justification, the Union was not willing to ignore many years of bargaining history in those areas. Ritz again agreed to accept the Respondent's arbitration-cost proposal in exchange for concessions regarding seniority and the grieving of job grading. Ritz also protested the Respondent's wage proposal and questioned the changed classifications. He proposed instead a two-tiered wage structure in which the Respondent would freeze wages for present employees, but apply its wage-reduction proposal to new hires. Burtch did not respond to this suggestion, but proposed a 3-year contract term.

After the parties caucused and reconvened, Burtch handed the Union a revised job classification schedule in which the new job classifications from its previous

<sup>9</sup>The provision stated:

It is understood that "non-bargaining personnel" may perform the work ordinarily performed by the Employees covered by this Agreement under the following conditions:

- (1) To experiment with equipment, machinery parts, material or products or with new methods of performing the operation.
- (2) To train new Employees or to give old Employees additional instructions.
- (3) To assist on jobs or operations where machinery malfunctions occur.
- (4) To manufacture and assemble prototype and experimental models.
- (5) To perform the work of an Employee where there is excessive absenteeism and such work is necessary, provided there are no other Employees available to do the work.

<sup>10</sup>The Respondent also proposed removing the contract's provision for pay for time spent processing grievances, requiring the losing party in arbitration to pay the full cost, changing the employee probationary period from 30 to 90 days, and eliminating the Union's right to grieve job grading.

<sup>11</sup>During the course of the January 6 negotiations, Ritz asked if the Respondent's December 16 wage proposal was still on the table and Burtch stated that it was. The judge found that Burtch's statement was "untruthful" because Mallette had already prepared an entirely new economic proposal. As discussed below, Mallette's proposal included new job classifications and an increased number of job grades. Under the circumstances, we find that it was not unreasonable for the Respondent to expend some time examining that proposal before presenting it to the Union on January 7; and we note also that the December 16 economic proposal was literally still on the table on January 6, i.e., if the Union had accepted it, the Respondent could not reasonably have asserted that it had been withdrawn. Hence, we do not agree with the judge that Burtch's statement on January 6 was "untruthful" in any meaningful sense.

<sup>12</sup>For example, Ritz stated that the Union would agree to the Respondent's arbitration-cost proposal if the Respondent dropped its proposals on union-security, seniority on bidding and bumping, and no grading grievances.

<sup>13</sup>The judge found that this wage proposal was regressive when compared to the Respondent's December 16 wage proposal.

<sup>14</sup>At this session, the Respondent proposed changing the "bidding and bumping" language in its prior proposal to "decrease, increase, or transfer of employees."

proposal were fitted into the existing number of 10, rather than 16, grades. There was no corresponding wage schedule. At the hearing, Ritz discussed the Union's concern with what the reclassification scheme "would do to pensions, vacations . . . bumping rights."

During this session, the Respondent dropped its proposal that union representatives would not be paid for time spent resolving grievances. The parties agreed on a 60-day probationary period. Burtch also stated that the Respondent would drop its cost-of-arbitration proposal if the Union would accept its proposals on no union-shop, seniority, and unit work being done by nonbargaining unit personnel. Following a caucus, the Union rejected that offer and instead accepted the Respondent's arbitration-cost proposal. The Union asked Burtch various questions about job classifications, and was referred to Mallette. Union Representative Prenatt then offered to accept a wage freeze and to move on economic benefits if the Respondent would agree to union security. He also indicated that the employees needed to keep their medical coverage intact but would be willing to move on holidays and vacations. Burtch responded that the Respondent was seeking wage cuts and that the parties were far apart on wages.

The parties met again on January 8, the contract expiration date. Burtch presented the wage rates that corresponded with the job grades and classifications that had been proposed the previous day. The wage proposal did not contain a time period. The Respondent dropped its demands that job selection and job grading would not be subject to the grievance procedure.

Ritz inquired about certain jobs that were eliminated under the classification scheme, and Burtch replied that he would have to check to get that information. Ritz stated that the Union would agree to the Respondent's benefit package in exchange for a wage freeze the first year. Burtch responded that the Union was not addressing the Respondent's proposed wage cut, and rejected, without explanation, the Union's request for a profit-sharing plan. Later that day, the Respondent dropped its proposal on employee contributions to the pension plan, and offered a 2-year wage proposal with a weighted hourly average of \$7.10.

On the evening of January 8, the Union held a ratification vote on the Respondent's latest contract offer. The unit employees voted unanimously to reject the proposals, but they voted against a strike. Ritz informed Burtch of the employees' vote and requested an additional extension of the contract, but Burtch refused his request, testifying that he felt a further extension would simply delay resolution of the bargaining issues.

When the parties met again on January 14, Burtch presented a new economic proposal which involved a restructuring of job classifications and an average

hourly wage of \$7.25. The parties did not reach agreement.

The next bargaining session was held on January 15 with a mediator present. Neither party submitted any new proposals. Burtch told the Union that he had put the Respondent's final proposals on the table on January 14. Burtch asked whether there were any non-economic concessions that the Respondent could make to make its economic package acceptable to the Union.<sup>15</sup> The Union did not identify any precise concessions.

On January 16, the Union received a telegram from the Respondent stating that unless the Union agreed to break the "impasse" and accept the Respondent's final January 14 proposal prior to January 20, the Respondent would implement the wages and benefits of that offer. On January 20, the unit employees voted unanimously to reject the Respondent's final offer. On January 21, the Respondent implemented the wages and benefits proposed in its January 14 offer, but did not implement any noneconomic terms. That same day, the Union by telegram denied the existence of an impasse, asked for the "immediate resumption of negotiations," and indicated that it was prepared to offer a counterproposal.

Further negotiations were held on January 27 with a Federal mediator present. The Union presented a counteroffer, proposing, *inter alia*, the use of Blue Cross/Blue Shield medical insurance coverage and the elimination of two holidays if the Respondent would agree to a union-security clause. The Union also agreed to certain cost-saving medical insurance proposals that the Respondent had made and to the elimination of dental coverage.

At this bargaining session, Prenatt told Burtch that if the Respondent would modify its demands for wage cuts, the Union would modify its proposed wage freeze and accept some cuts. Additionally, the mediator informed the Respondent that the Union was flexible on wages and benefits and holidays. In response, Burtch stressed that the Respondent was not going to modify its January 14 offer, and continued to insist that the parties were at impasse.

In about February, one of the Respondent's owners donated \$10,000 to a local church. The church sent a letter to the Respondent's employees informing them about the availability of the funds.<sup>16</sup> Interested persons

<sup>15</sup> See the Board's initial decision in this case, 303 NLRB at 169 fn. 6.

<sup>16</sup> Contrary to the Respondent's contention in its statement of position, the judge admitted the letter into evidence. The letter stated in pertinent part:

A charitable donation has been made available to the Lowville Mennonite Church to assist employees of AMF Incorporated who have experienced extreme pay cuts and are now experiencing financial difficulties. Anyone experiencing large medical

were to contact Evan Zehr, who served on the distribution committee and was also one of the Respondent's supervisors. A number of unit employees subsequently received financial aid.

On March 4, the Union sent the Respondent a letter requesting further bargaining. By letter dated March 16, Burtch reiterated the Respondent's position that the parties were at impasse, and noted that at the January 27 bargaining session, the Union "modified its proposals in some minor areas, but made no significant changes in position." Burtch concluded that "unless the Union's position has altered dramatically, further meetings would . . . be futile."

Despite the Respondent's position, a mediator arranged a final meeting for April 30. Corcoran, the Union's subdistrict director and spokesperson for the meeting, indicated that the Union continued to be flexible and had come "in the spirit of negotiation." Regarding wages, the Union proposed a 10-percent reduction in the rate from the expired contract in the first year, a 3-percent increase in the second year, and a 4-percent increase the third year. The Union accepted the Respondent's January 14 proposals regarding job selection based on ability rather than seniority, holiday cuts, and job classifications, as well as some of the Respondent's health care and vacation accrual proposals. At the session, Corcoran asked Burtch if the union-security provision of the contract was causing any disruption and inquired as to what the problems were in the area of unit work being performed by nonunit employees so that the parties could try to arrive at an acceptable compromise.

Stating that he did not view the Union's proposal as "realistic," Burtch asserted that he had wasted his time in coming to the bargaining session and that the Respondent wanted the complete acceptance of its January 14 offer. Burtch further suggested that if he were to devise a counteroffer, it might include changes in the seniority section of the agreement.

When questioned as to why the Respondent had not responded favorably to the Union's proposed wage cuts, Burtch responded that, because the employees were actually working at the lower wage rates which the Respondent had implemented in January, the Union's April 30 proposal actually involved an *increase* in the prevailing wage rates. Burtch admitted that he did not cost out the Union's counterproposal.

On May 17, the Respondent informed the Union and its members that it was unilaterally changing the vacation accrual system to conform to that of the salaried, nonunit employees.

On May 28, the Respondent withdrew recognition from the Union based on a petition signed by 69 unit employees stating that they no longer wished to be

represented by the Union.<sup>17</sup> Beginning in June, the Respondent applied the policies contained in its salaried employees' personnel manual to its unit employees. The Respondent also encouraged and established an employee grievance committee, and implemented production bonuses, a profit-sharing plan, a merit-review program, a 401(k) plan, and employee cash awards.

On August 6, the Union submitted a written request for information regarding the establishment of the new pension plan, and the amount and manner of contributions under that plan.<sup>18</sup> The Union stated that it needed the information to verify that contributions deducted from the employees' paychecks were being remitted to the new plan. By letter dated August 25, the Respondent indicated that it was reviewing the information requested, and that it would respond "as soon as it is available, to the extent appropriate." On October 15, the Respondent sent the Union some of the requested information.<sup>19</sup> Burtch testified that he did not provide the Union with a copy of the plan because it was not drawn up until January 1988, and attributed the 2-month delay in providing some of the information to difficulties he had in "pull[ing] all this, these different pieces together."

1. In analyzing the complaint's allegation that the Respondent bargained in bad faith during contract negotiations with the Union, we first note that Section 8(d) of the Act does not require either party in collective bargaining to agree to a proposal or to make a concession. See, e.g., *Houston County Electric Cooperative*, 285 NLRB 1213 (1987). To determine whether an employer has bargained in bad faith, it is necessary to examine the totality of the employer's conduct. See, e.g., *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

Applying these principles to the facts here, we find, for the following reasons, that the several factors relied on by the judge do not establish that the Respondent engaged in bad-faith bargaining. In particular, we find that the judge's finding of bad faith was based in large part on his subjective evaluation of the Respondent's proposals, and that the judge failed to consider adequately the totality of the circumstances. For the reasons set forth below, however, we agree with the judge's finding that there was no genuine impasse when the Respondent implemented the economic terms of its January 14 offer.

<sup>17</sup> Mallette testified that at that time there were 104 unit employees.

<sup>18</sup> Specifically, the Union requested copies of the summary plan description, the trust instrument and the plan instrument for the new plan, and records of current accrued benefits under the new plan.

<sup>19</sup> The Respondent sent a statement of total monthly retirement contributions for 1987, a 1985 pension plan summary, and documents regarding the transfer of assets between the Respondent and Minstar, and the Respondent's obligation to designate a successor pension plan.

bills or difficulty in meeting other payments will be given top priority.

The judge found that, throughout the entire course of bargaining, the Respondent made both economic and noneconomic proposals that were designed to frustrate agreement. The judge found that the Respondent insisted on noneconomic proposals that would eliminate provisions from the contract that were essential to the Union's role as bargaining representative. In particular, the judge found that the Respondent's proposals to eliminate the union-security clause from the existing contract; to provide that selections for bidding and bumping would be made according to ability, as determined by the Company, rather than by seniority; and to provide without limitation that nonbargaining unit personnel could perform unit work indicated a bad-faith bargaining posture. The judge also cited as evidence of bad faith the Respondent's proposals to eliminate disputes relating to job grades and seniority from the grievance procedure, finding that such proposals were "predictably unpalatable [sic] to the Union."

Examining the proposals relied on by the judge, we find that they do not establish that the Respondent engaged in bad-faith bargaining, or undertook to denigrate the Union's representational role. First, we disavow the judge's characterization of certain of the Respondent's proposals as "inflammatory" or "unpalatable." The Board stated in *Reichhold Chemicals*, 288 NLRB 69 (1988), rev'd. on other grounds sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), that its examination of specific bargaining proposals will not involve decisions "that particular proposals are either 'acceptable' or 'unacceptable' to a party." Rather, the Board will examine proposals, when appropriate, and will consider whether, on the basis of objective factors, a proposal is clearly designed to frustrate agreement on a collective-bargaining contract. Id. at 69.

In finding that the Respondent's proposal to eliminate union security evidenced bad-faith bargaining, the judge emphasized that the only reason the Respondent advanced for its proposal was a philosophical one, and faulted the Respondent's failure to trade off union security in order to achieve from the Union the wage cut that it was seeking or to present alternative union-security proposals. We disagree on both counts.

The existence of a union-security clause in previous contracts does not by itself obligate the parties to include it in successive agreements. *Challenge-Cook Bros.*, 288 NLRB 387, 388 (1988) (and cases cited therein). Further, a party may stand firm by a bargaining proposal legitimately proffered. *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981). In this case, the General Counsel has failed to demonstrate that the Respondent asserted its proposal disingenuously or was unwilling to discuss union security with the Union. Nor is there sufficient evidence that

the Respondent adhered to its proposal with the intent to frustrate agreement. See *Logemann Bros. Co.*, 298 NLRB 1018, 1020 (1990); *Challenge-Cook Bros.*, above.

With regard to the question of whether the Respondent adhered to its position on union security in order to frustrate agreement, we note that, on January 15, Burch asked if there were any noneconomic concessions the Respondent could offer to make its economic proposals acceptable, but the Union failed to identify any such concessions. Finally, to the extent that the judge suggested that the Respondent should have proffered alternative proposals or cited problems or complaints with the existing union-security provision, we find that he attempted to substitute his judgment for that of the Respondent in assessing the appropriateness of the substantive terms of its bargaining proposals. That the Board may not do. See *Commercial Candy Vending Division*, 294 NLRB 908, 910 (1989).

Similarly, we find no evidence of bad-faith bargaining based on the Respondent's adherence to the remaining proposals relied on by the judge. In our earlier decision, we reversed the judge's finding that the Respondent's insistence on its proposal giving nonunit employees the right to perform unit work without limitation was per se unlawful. We find no evidence that the Respondent's overall behavior during the negotiations on the unit-work proposal constituted bad-faith bargaining. Although the judge faulted the Respondent's failure to propose changing the language to apply only to supervisors, we note that the Respondent's proposal was arguably more focused than the provision in the existing contract which, unlike the bargaining proposal presented, did not specify "supervisors" parenthetically. In any event, the law does not require parties to present their proposals in any particular fashion, or to offer them in the way that would be most appealing to the other party. Id. at 909 fn. 11. In addition, the Respondent's bargaining posture strengthened over time as the union members voted on January 8 not to strike. Therefore, the Respondent's adherence to its noneconomic proposals was not necessarily indicative of an intent to avoid reaching agreement with the Union. See *L. W. Le Fort Co.*, 290 NLRB 344, 345 (1988).<sup>20</sup>

The judge also relied on the Respondent's proposals to eliminate seniority as a factor in determining bumping and bidding rights and to remove job grading from the grievance procedure as evidence that the Respondent was seeking to denigrate the Union's representational role. In our prior decision, we corrected the

<sup>20</sup>For the above reasons, we also find, contrary to the judge, that the Respondent's adherence to its noneconomic proposals was not evidence that Burch lacked the authority to make bargaining concessions. Rather, we find that the Respondent engaged in lawful hard bargaining by standing firm on certain of its proposals.

judge's findings that the Respondent insisted throughout negotiations on a proposal to make job selection and grading nongrievable, finding that the Respondent dropped these proposals during the January 8 negotiating session. Further, we do not agree with the judge's finding that the Respondent's noneconomic proposals would have denigrated the Union's representational role or rendered substantial portions of the contract unenforceable. As the Respondent notes in this regard, it did not seek, for example, to expand the management-rights clause, limit the Union's right to strike, expand its authority over discharge and discipline, or modify the dues-checkoff arrangement. Thus, we find that this case is distinguishable from *Prentice-Hall, Inc.*, 290 NLRB 646 (1988), relied on by the judge, in which the Board inferred from the combination of proposals that the employer was seeking—including a sweeping management-rights clause and a broad no-strike clause with no effective grievance-and-arbitration procedure—that it did not want to reach agreement because the union would be in a better position simply relying on its certification than agreeing to the employer's proposed contract offer, substantial portions of which would have been virtually unenforceable. Rather, the Respondent's proposals are more analogous to those offered in *Logemann Bros.*, above, and *Sage Development Co.*, 301 NLRB 1173 (1991), in which, in the context of financial losses suffered by the respondents and an apparent need for economic concessions, the Board found that the respondents' proposals did not involve virtual abolition of the unions' representational roles.<sup>21</sup>

With regard to the Respondent's economic proposals, which were central to the negotiations, the judge found that the Respondent bargained in bad faith by rigidly adhering to its demands for huge wage cuts and severe reductions in benefits and then, in the face of demonstrated flexibility by the Union as to its economic proposals, making wage proposals that were regressive.<sup>22</sup> Again, we disagree.

Proposals that seek deep reductions in allegedly noncompetitive existing benefits do not necessarily indicate a desire to frustrate negotiations. *Concrete Pipe & Products Corp.*, 305 NLRB 152, 153 (1991), *enfd.* 983 F.2d 240 (D.C. Cir. 1993). Here, the court found that the Respondent's new owners made clear throughout negotiations their position that the wages at Lowville were higher than wages elsewhere and that the plant was losing money. The court further found

that there was no evidence that the Union disbelieved the Respondent's claim about the Lowville wage rates or disputed the Respondent's point that the Company's previous owners had recently negotiated a collective-bargaining agreement with the Shelby workers in which the workers agreed to a 24-percent wage cut. Mallette testified that the Union was aware of the concessions negotiated at the Shelby plant. Thus, it is apparent that the Respondent viewed itself as being in a strong bargaining position and not readily susceptible to pressure to make concessions. See *Anaheim Plastics*, 299 NLRB 79, 100 (1990).<sup>23</sup> As the Board stated in *Concrete Pipe*, 305 NLRB at 153, "[a]n employer's desire to bring its labor costs in line with its competitors, standing alone, is not an illegitimate bargaining goal."

We also reject the judge's finding that the Respondent demonstrated bad faith by making a regressive wage proposal on January 7. In our initial decision, although we found that the Respondent's January 7 proposal was regressive when compared to the Respondent's December 16 proposal, we noted that the evidence concerning the number of unit employees that the Respondent employed on January 7, necessary for computing the weighted hourly average wage rates, is not clear. See 303 NLRB at 168 *fn.* 5.<sup>24</sup> In any event, we do not find that the Respondent's regressive proposal on January 7 establishes bad faith. A regressive economic position during bargaining is not of itself dispositive of the good-faith issue where economic considerations and the ability to compete motivate the regressive bargaining stance. See *Hyatt Regency Memphis*, 296 NLRB 259, 314 (1989). Moreover, here it is undisputed that the Respondent's January 8 and 14 offers, which had weighted averages of \$7.10 and \$7.25, respectively, were in fact more generous than the December 16 and January 7 offers.

We also disavow the judge's finding that the Respondent demonstrated bad faith in February by establishing a \$10,000 fund through a local church for the purpose of assisting employees who had experienced financial difficulties as a result of the economic cuts

<sup>23</sup> In *Anaheim Plastics*, the Board adopted the judge's finding that the respondent did not bargain in bad faith. In so finding, the judge relied on the fact that the respondent, *inter alia*, adhered to its economic proposals based on its position that the labor market did not compel higher compensation to attract workers.

<sup>24</sup> As additional evidence of the confusion, we note that the judge was internally inconsistent in his opinion about the value of various of the Respondent's wage proposals. For example, the judge characterized the Respondent's December 16 wage proposal as both a 24-percent cut and a 22-percent cut, and assigned inconsistent values to the weighted hourly average of the January 7 offer and to the value of the pay cut that it represented. We further note Mallette's testimony that the Respondent's December 16 and January 7 proposals were essentially different, and thus difficult to compare, because they involved different numbers of job grades to be used in computing their weighted hourly average wage rates.

<sup>21</sup> In *Logemann Bros.*, the respondent proposed a broad management-rights clause and the elimination of union-shop and dues-checkoff provisions. In *Sage Development Co.*, the respondent proposed a voluntary hiring hall, unilateral employer classification of new employees, and a no-strike clause with no exceptions.

<sup>22</sup> In view of the court's holding, we do not rely on the Respondent's failure to provide the Union with its wage surveys as evidence of bad faith.

that the Respondent implemented after declaring impasse. Mallette, whom the judge credited, testified that Goodwin, one of the Respondent's owners, donated money to the church "for use as they saw fit," and that Zehr, who was one of the Respondent's supervisors, was a member of the church's committee that reviewed requests for money. A letter was sent to employees to inform them about the funds but it did not identify the source of the money. There is no evidence that the employees were aware, or even suspected, that the donation was a personal contribution from the Respondent's owner. Under the circumstances, we are unable to find that the church's fund was an indicium that the Respondent bargained in bad faith.

In support of his finding that the Respondent bargained in bad faith, the judge also found that the Respondent was not prepared to bargain. Specifically, the judge found that although the Respondent had several months to prepare for collective bargaining, it was unprepared to submit any proposal at the initial bargaining session on December 3 and submitted an incomplete economic proposal on December 16. The judge further relied on the fact that the Respondent did not begin to prepare figures and proposed job classifications until after the December 16 meeting, and did not submit its initial wage offer and job classification structure until January 7, a day before the extended agreement was to expire. In finding this conduct to be evidence of bad faith, the judge cited *Professional Eye Care*, 289 NLRB 1376, 1392 (1988), in which the Board found that the respondent engaged in bad-faith bargaining where, inter alia, its negotiator was uninformed regarding terms and conditions of employment and had not either consulted the owners or obtained sufficient bargaining authority to make proposals varying from the status quo. The Board in *Professional Eye Care* further found that the respondent "did not engage in bargaining in a businesslike way." For example, the respondent never submitted written proposals to the union, lost the union's proposals, and usually did not return the union's calls.

Here, by contrast, Burtch responded promptly when the Union requested bargaining. The Respondent met with the Union on seven occasions between December 3 and January 15, 1987. There is no contention that the Respondent failed to meet at reasonable times and places. Unlike the judge, we do not find that the Respondent's failure to prepare a complete wage proposal until after the second bargaining session is an indication of bad-faith bargaining. The Board has recognized that it is not uncommon in the field of collective bargaining for one of the parties to come to the bargaining table with a new negotiator, unfamiliar with the collective-bargaining history and the informal relations between the parties. A certain "breaking in" is some-

thing to be expected.<sup>25</sup> See *U.S. Marine Corp.*, 293 NLRB 669, 689 (1989); *88 Transit Lines*, 300 NLRB 177, 178 (1990), enf. mem. 937 F.2d 598 (3d Cir. 1991). Here, not only was Burtch a "new negotiator," but the Respondent at the time of negotiations was under new ownership. Under the circumstances, we find that it was not bad faith for the Respondent to listen to the Union's proposals at the initial bargaining meetings before submitting its own proposals.<sup>26</sup>

Mallette testified that he talked to Burtch a couple of times on the phone prior to the commencement of negotiations. In addition, there were conference calls among Genovese, Burtch, and Mallette in November and December, and the Respondent in mid-December decided that its opening offer would start out at the Shelby level of wages and benefits. The Respondent's new owners toured the plant on December 23, and met with Burtch in late December and early January to discuss modifications to the Respondent's initial wage proposal and the Respondent's noneconomic bargaining objectives. At this time, the owners presented Burtch with a document outlining the Respondent's bargaining objectives.

As the Board in *I.T.T. Rayonier, Inc.*, 305 NLRB 445, 446 fn. 6 (1991), observed:

there is nothing improper in an employer's commencing negotiations with a broad outline of proposals that are nonspecific and attempting to obtain through negotiations the Union's cooperation in developing contract language to resolve a specific concern. However, if the Union is unwilling to participate in that form of negotiation, and the company nonetheless wishes to achieve its aims, the company must, to fulfill its bargaining obligations, put "meat on the bone." It must submit proposals that are specific so that the Union can analyze the impact of the company's proposals and take a position on them.

Here, unlike in *I.T.T. Rayonier, Inc.*, the Respondent's economic proposals became more specific. The Respondent announced at the initial bargaining session that it would seek economic concessions because of manufacturing losses and its perceptions regarding the market wage rate. After the Union rejected the Respondent's initial economic proposal on December 16, which sought the same percentage of wage and benefit reductions as were in effect at the Shelby plant, the Respondent on January 7, 8, and 14 presented a series

<sup>25</sup> For these reasons, we do not rely on the judge's finding that Burtch's testimony concerning the Respondent's lack of time to prepare for negotiations by December 3 was untruthful and demonstrated a lack of credibility.

<sup>26</sup> Cf. *Hayward Dodge*, 292 NLRB 434, 465-466 (1989) (not evidence of bad-faith bargaining that during the first bargaining session respondent refused to submit a contract proposal to the union until after respondent first considered the union's proposal).



of economic proposals that involved restructuring job classifications and varying numbers of job grades. Thus, there is no indication that, as in *Professional Eye Care*, the Respondent refused to conduct negotiations in a “businesslike manner,” by, inter alia, failing to submit to the Union written proposals.<sup>27</sup>

Regarding the Respondent’s submission of its economic proposals, the judge found that the Respondent purposefully delayed submitting its wage proposals and deliberately withheld from the Union the proposed wages from its written proposal on January 7, the day before the contract expired, as “part of its overall scheme to frustrate bargaining and to rid itself of the Union.” He further found that this conduct was deliberate and was evidence of bad-faith bargaining. Citing the Respondent’s failure to grant the Union a requested contract extension on January 8 in order to evaluate the Respondent’s proposals, the judge concluded that the Respondent bargained in bad faith by failing to give the Union reasonable time to evaluate and respond to its January 8 and 14 proposals.

Under all the circumstances, we do not find that a preponderance of the evidence establishes that the Respondent avoided presenting its proposals or concealed wage rates, or both, in order to avoid reaching agreement with the Union. On January 7, when presented with the wage proposal that Mallette had prepared during the Christmas break, Local President Ritz protested the wage proposal and questioned the changed job classifications and number of grades. After the parties caucused and reconvened, Burtch handed the Union a revised job classification schedule in which the new job classifications from its previous proposal were fitted into the preexisting number of 10 rather than 16 grades. Although the new schedule did not contain proposed wage rates, the Respondent provided the missing wage rates on January 8. We are unable to conclude that, in terms of timing, and the circumstances of this case, the presentation of these proposals including the absence of wage rates on one of the January 7 proposals, was designed to frustrate

agreement.<sup>28</sup> In particular, we disagree with the judge’s finding that the Respondent engaged in a campaign to undermine the Union. Examining the Respondent’s conduct prior to its declaration of impasse on January 16, there is no evidence of animus or pre-impasse conduct away from the bargaining table establishing an intent by the Respondent to frustrate agreement.<sup>29</sup> Additionally, although the Respondent did not grant the Union an extension of the contract, we note that the Union requested the extension after its members had voted not to strike. Thus, the Respondent was in a position of increased bargaining strength. See *L. W. Le Fort Co.*, 290 NLRB 344 (1988).

On these facts and for all of these reasons, we do not agree with the judge that the Respondent has demonstrated the kind of intransigence and insistence on its own proposals that evidences bad faith. Accordingly, we reverse the judge’s finding that the Respondent violated Section 8(a)(5) and (1) of the Act by bar-

<sup>28</sup> This case is distinguishable from *Viking Connectors Co.*, 297 NLRB 95, 106 (1989), cited by the General Counsel, in which the Board found that the respondent sought to delay negotiations past the certification year when recognition could be withdrawn.

<sup>29</sup> See *Coastal Electric Cooperative*, 311 NLRB 1126 (1993) (absent indicia of bad faith, including no evidence of animus or conduct away from the bargaining table establishing an intent by respondent to frustrate agreement, the respondent’s failure to make concessions is not a sufficient manifestation of bargaining with intent to avoid agreement).

We find that the instant case is distinguishable from *American Meat Packing Corp.*, 301 NLRB 835 (1991), relied on by the General Counsel. The General Counsel contends that in that case, the respondent offered work preservation and reclassification of job classifications and wage rates proposals that were similar to those offered by the Respondent here, and that evidenced a “take-it-or-leave-it” approach to bargaining. The General Counsel, in analogizing these cases, also relies on the fact that in *American Meat Packing*, the respondent predicted 3 days after the announcement of its new classification scheme that implementation would take place unilaterally in the future.

Here, we have found that the Respondent’s insistence on its proposal to permit nonunit employees to perform unit work was not per se unlawful. Unlike the situation in *American Meat Packing*, above at 837 fn. 9, there is no evidence that the Union proposed specific modifications to the language of the proposal which the Respondent rejected outright. Additionally, in finding that the respondent in *American Meat Packing* bargained in bad faith, the Board relied on the totality of the circumstances in that case, including the following factors which are not present here: statements by negotiators indicating that agreement would be reached only by the union accepting the respondent’s proposals; insistence on contract provisions that together would effectively nullify the union’s ability to serve as the employees’ collective-bargaining representative; a systematic campaign directed at employees to disparage and discredit the union; and threats of job loss and plant closing. Finally, the Board found that the respondent in *American Meat Packing* imposed an unlawful condition on the provision of financial information. Here, the court held that the Respondent’s failure to open its books to the Union was not a violation of the Act. Thus, the totality of the circumstances in *American Meat Packing*, unlike here, manifested an intent to undermine employee support for the union and to impose what the respondent had determined at the outset was a fair set of terms and conditions of employment.

<sup>27</sup> Similarly, we reject the General Counsel’s contention that the Respondent demonstrated bad faith by failing to invest Burtch with sufficient authority to engage in meaningful collective bargaining. Thus, Burtch reached agreement with the Union on significant contractual items. See *Industrial Chrome Co.*, 306 NLRB 79, 84 (1992). For example, as discussed above, the Respondent through Burtch withdrew its proposals to eliminate the Union’s ability to grieve job grading and job selection decisions. Additionally, there is no evidence that Burtch engaged in other activity that the Board has found indicative of insufficient bargaining authority. Cf. *Wycoff Steel*, 303 NLRB 517, 524 (1991); *Professional Eye Care*, above. Finally, as we discussed above, under the circumstances present in this case, the fact that the Respondent stood firm on certain of its noneconomic proposals is not evidence that Burtch lacked the authority to engage in meaningful bargaining.

gaining in bad faith prior to its declaration of impasse. We shall dismiss that portion of the complaint's allegations.

2. Although we have found that the Respondent did not bargain in bad faith before declaring impasse, we nevertheless find, in agreement with the judge, that the Respondent's declaration of impasse on January 16 was premature.<sup>30</sup> The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. *Pillowtex Corp.*, 241 NLRB 40, 46 (1979). "Both parties must believe that they are at the end of their rope." *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enfd.* 836 F.2d 289 (7th Cir. 1987).<sup>31</sup> Applying these principles here, we find no basis for concluding that the parties were at impasse on January 16. Prior to the Respondent's statement of impasse on that date, the parties had met on seven occasions in December and January. However, the Respondent had presented only a general economic proposal on December 16, at which time Burtch had not yet familiarized himself with the existing contract. Further, the various and more detailed economic proposals that the Respondent presented on January 7, 8, and 14 differed from one another and from the existing wage and grade/classification system in terms of the number of job grades, the classifications in each grade, and the wage rates assigned to each job grade.

The Union demonstrated flexibility throughout the course of bargaining. For example, with respect to the parties' economic proposals, the Union initially moved from requesting an 8-percent wage increase to a 6-percent wage increase. On January 6, the Union indicated that it would consider benefit reductions if the Respondent would reconsider its demand for reduced wages. On January 7, the Union proposed a bifurcated wage structure involving a wage freeze for the Respondent's present employees and a wage reduction for new hires, and then offered to accept a wage freeze and move on economic benefits if the Respondent would agree to the retention of a union-security clause in the contract. Finally, on January 8, the Union offered to accept the Respondent's benefit package in exchange for a first-year wage freeze in lieu of cuts, and also raised the possibility of implementing a profit-sharing program. Given this movement by the Union, the Respondent was not justified in concluding that negotiations were at impasse simply because the Union's concessions were not more comprehensive or sufficiently generous. See *Larsdale, Inc.*, 310 NLRB 1317, 1319 (1993) (and cases cited therein); *Wycoff Steel*, *supra* (no impasse where, *inter alia*, both parties had

moved during seven bargaining sessions and the union consistently and continuously advised the respondent of its willingness to be flexible). Similarly, the Respondent was not justified in failing to explore the Union's offers to discuss potential tradeoffs for, or alternatives to, wage reductions because of its asserted perception that the Union would not agree to wage reductions. Rather, the Respondent was required to give the bargaining process a chance to work. See *Stephenson-Yost Steel*, 294 NLRB 395, 396 (1989). As the court held in *NLRB v. Eltec Corp.*, 870 F.2d 1112, 1117 fn. 2 (6th Cir. 1989):

Respondent's duty to bargain . . . is not negated by the possibility or even the substantial probability that the Union would not agree to respondent's proposed economic concessions. The purpose of the duty to bargain is to give the collective bargaining process a chance to operate regardless of the possibility of success. To hold otherwise would allow employers and unions to skip the bargaining stage altogether based upon their perceptions regarding the low probability of reaching an agreement.

We acknowledge that on January 15, the Union, when asked by Burtch if there were any noneconomic concessions that the Respondent could make to make its economic package acceptable, did not identify any precise concessions. However, the Union, which had already demonstrated substantial flexibility through its various counterproposals, did not indicate that no further concessions could be expected. Moreover, we note that at this time, the Respondent had not furnished the Union with requested information regarding its pension plan and health insurance plans, and many of the questions that the Union had asked during negotiations remained unanswered, including questions about job classifications that had been eliminated. The Respondent had also refused, without explanation, even to consider the Union's suggestion of profit sharing. We further find that the Respondent's failure to settle the duration of the contract that it had proposed precluded final resolution of its economic package. This omission further supports our finding that the Respondent failed to establish that further bargaining would have been futile when it declared impasse on January 16. See *Outboard Marine Corp.*, 307 NLRB 1333, 1336 (1992).

Regarding the Respondent's January 14 final offer, Local President Ritz testified that the Union was trying to determine how the new classifications in the proposal would affect benefits and other terms and conditions of employment, such as bumping and bidding rights.<sup>32</sup> In this regard, we note that it was not until

<sup>30</sup> A party can prematurely declare impasse, but do so in good faith. See *Hayward Dodge*, 292 NLRB 434, 466 (1989).

<sup>31</sup> See generally *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

<sup>32</sup> Under the unaltered proposal in the existing contract, for example, employees in certain job grades could bump by seniority into

January 8 that the Respondent dropped its proposals that job selection and grading would not be grievable. Under the circumstances, we find that, as in *Herman Bros., Inc.*, 307 NLRB 724 (1992), “further bargaining was clearly required before impasse could be reached, even if only to provide the Union a basis for understanding the economic significance of the totally new wage formula.” See also *NLRB v. WPIX*, 906 F.2d 898, 901–902 (2d Cir. 1990), *enfg.* 293 NLRB 10 (1989).

In finding that the parties were not at impasse in January, we reject the Respondent’s contentions that what it characterizes as the Union’s repeated assertions that it would not consider wage cuts until the Respondent opened its books presented an obstacle to settlement and “stymied the negotiations.” In making this argument, the Respondent relies on *Concrete Pipe & Products Corp.*, 305 NLRB 152, 153–154 (1991), in which, as in this case, the Steelworkers Union was represented at negotiations by Business Agent George Prenatt. In *Concrete Pipe*, following the respondent’s demands at the outset of negotiations for substantial reductions in existing benefits, Prenatt stated that it was a policy of the International Union “not to negotiate for concessions unless they were given the company books.” The Board found that the collapse of negotiations in *Concrete Pipe* was attributable to the union’s insistence that the respondent furnish financial information and the respondent’s refusal to do so, which the Board found was justified.

We acknowledge the similarities between Prenatt’s demands to see the company’s books during the negotiations at issue in *Concrete Pipe* and his demands to see the Respondent’s books during the negotiations at issue here; but we see certain crucial differences that warrant a finding here that the parties were not at impasse on January 16 when the Respondent declared impasse or on January 21, when the Respondent implemented the wages and benefits proposed in its latest offer. According to some of the testimony on which the Respondent relies, on December 3, the union representatives had responded to the Respondent’s demands for concessions in wages and benefits by maintaining that no concessions would be considered unless the Respondent opened its books. Yet at the January 6 session the Union stated it would consider accepting benefit reductions, and on January 7 it offered to accept cuts in the wage levels for new hires. This bargaining table conduct was a clear indication that the demands for financial information, even if not complied with by the Respondent, were not immutable barriers to the Union’s agreement to make concessions. Furthermore, as the Respondent concedes in its brief in

support of its exceptions, it had been advised by the mediator on January 14 that the Union was prepared to take a wage cut of \$1 an hour. Although the Respondent’s negotiators were annoyed that the Union did not actually make that offer on January 15, it was not clear that further bargaining would be futile, i.e., that the Union would make no further movement on items important to the Respondent and that the parties had “exhausted the prospects of concluding an agreement.” *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).<sup>33</sup>

For these reasons, we agree with the judge that there was not a genuine impasse on January 16, and that by prematurely declaring impasse and by subsequently implementing its economic proposals on January 21, the Respondent violated Section 8(a)(5) and (1) of the Act. See *Larsdale, Inc.*, above, 310 NLRB at 1319.

3. Relying on the absence of a valid impasse, we reaffirm our findings that the Respondent committed additional violations of Section 8(a)(5) of the Act. Regarding the Respondent’s May 28 withdrawal of recognition, it is well settled that a good-faith doubt as to a union’s continuing majority status can arise only in a context free of the coercive effect of unfair labor practices of such a character as to either affect the union’s status, cause employee disaffection, or improperly affect the bargaining relationship itself. *Lee Lumber & Building Material*, 306 NLRB 408, 424 (1992). The Board has recognized that unlawful unilateral changes made in the absence of a genuine impasse in negotiations tend to cause employee disaffection with their bargaining representative. See *NLRB v. Powell Electrical Mfg.*, 906 F.2d 1007 (5th Cir. 1990), *enfg.* as modified on other grounds 287 NLRB 969 (1987). We therefore find that the Respondent was not privileged to withdraw recognition from the Union on the basis of the employees’ petition, and that the Respondent’s withdrawal of recognition was unlawful. Additionally, we find that the Respondent violated Section 8(a)(5) by thereafter implementing additional unilateral changes and by dealing directly with employees regarding terms and conditions of employment, including forming and encouraging employee grievance committees. See *Allied-Signal, Inc.*, 307 NLRB 752, 753–754 (1992); *T.L.C. St. Petersburg*, 307 NLRB 605, 610 (1992). We further find that the Respondent violated Section 8(a)(5) by refusing to provide the Union with

positions in specified grades. By reducing the number of job classifications in some of the grades, the Respondent’s proposals limited the number of job classifications in which to move.

<sup>33</sup> We note, in fact, that at the meeting on January 27, after the Respondent had implemented its last proposal, the Union offered to accept wage cuts for current employees, as well as for new hires. We do not regard this evidence postdating the alleged impasse as in any way essential to the finding that there was no impasse on the date that the Respondent declared it. Rather, we cite it as further evidence that the union representatives’ statements that no concessions would be made unless the Respondent opened its books were not, as in *Concrete Pipe*, manifestations of an attitude that would make “the collapse of negotiations . . . inevitable.” 305 NLRB at 153.

information that was requested on August 6 regarding the Respondent's pension plan.<sup>34</sup>

Additionally, we reaffirm our finding that the Respondent violated Section 8(a)(5) by its March 16 letter in which Burtch reiterated the Respondent's position that the parties were at impasse and indicated that the Respondent would not bargain further unless the Union "altered dramatically" its bargaining proposals. As we discussed, in the absence of a valid impasse, the Respondent could not legitimately precondition further negotiations on the Union's willingness to alter its bargaining stance. 303 NLRB at 170.<sup>35</sup>

Finally, we reaffirm our finding that Burtch's statement at the April 30 bargaining session that the Union had "wasted his time" by arranging to meet, considered in the context of significant concessions by the Union, demonstrated an intent not to reach agreement and thus violated Section 8(a)(5). In 88 *Transit Lines*, 300 NLRB at 179, the Board found that similar statements made by the respondent's representatives at the early "get acquainted" bargaining sessions were not manifestations of bad faith. In so finding, the Board relied on the fact that at least one of the statements appeared not to be a response to bargaining generally, but was "the result of momentary pique at what was viewed as a demand by the Union that the Respondent agree to the Union's entire initial contract proposal." Additionally, the Board in 88 *Transit Lines* focused on the parties' actual conduct at subsequent bargaining sessions, finding that agreement was reached on a number of issues.

"An opening negotiating position often bears little resemblance to the conditions ultimately accepted after rounds of serious bargaining." *NLRB v. WPIX*, 906 F.2d at 902. Here, however, unlike the situation in 88 *Transit Lines*, Burtch's statement that negotiations would be a waste of time were not part of the bluster and banter of bargaining table rhetoric during the early stages of negotiations. See also *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235 fn. 6 (1989), enfd. 924 F.2d 1078 (D.C. Cir. 1991). Rather, the statement was made at the final bargaining session after the Union demonstrated significant movement by proposing a 10-

percent reduction in the wage rate from the expired contract for the first year. In view of the Union's proposal, the Respondent's contention that the Union never moved on the pivotal wage issue is plainly without merit. Considered also in the context of the Respondent's unlawful unilateral changes and its March 6 statement unlawfully conditioning any further bargaining, we find that Burtch's statement demonstrated an intent not to reach agreement.<sup>36</sup> See *White-Evans Service Co.*, 285 NLRB 81, 97 (1987) (respondent's statement that further negotiations were a waste of time impeded the possibility of a bargaining agreement).<sup>37</sup>

## SECOND AMENDED CONCLUSIONS OF LAW

Substitute the following for Amended Conclusion of Law 5.

"5. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act by: (a) making unilateral changes in its employees' terms and conditions of employment; (b) refusing to bargain with the Union unless there was a dramatic alteration in the Union's bargaining proposals; (c) accusing the Union of wasting its time during contract negotiations; (d) withdrawing recognition from the Union; (e) dealing directly with unit employees with respect to terms and conditions of employment by forming and assisting employee grievance committees; and (f) failing to provide or delaying in providing the Union with information regarding the employees' pension plan."

## ORDER

The National Labor Relations Board reaffirms its Order in the underlying proceeding, 303 NLRB 167 (1991), as modified, and orders that the Respondent, A.M.F. Bowling Company, Inc., Lowville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Prematurely declaring an impasse in collective-bargaining negotiations."

2. Substitute the following for paragraph 1(g).

"(g) Failing to provide to the Union or delaying in providing, on request, pension plan information regarding the terms and provisions of the plan and contributions made on the unit employees' behalf."

3. Delete paragraph 2(e) and reletter the remaining paragraphs.

<sup>34</sup> In the underlying case, the Board inadvertently failed to consider the General Counsel's contention, made in his cross-exceptions, that the Respondent's unexplained 2-month delay in providing some of the information constituted a further violation of Sec. 8(a)(5). We find merit in the General Counsel's contention, and shall amend our previous Order and notice accordingly. See *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993); *D.J. Electrical Contracting*, 303 NLRB 820 fn. 1 (1991); *Champ Corp.*, 291 NLRB 803, 879 (1988), enfd. 933 F.2d 688 (9th Cir. 1990).

<sup>35</sup> Cf. *Hospitality Care Center*, 307 NLRB 1131, 1135-1136 (1992) (judge rejected the respondent's defense that its refusal to meet unless the union demonstrated flexibility was motivated by its belief that impasse had been reached, finding that the respondent's actions were motivated by the filing of a decertification petition).

<sup>36</sup> We further note that Burtch admitted that he did not cost out the Union's April 30 proposal.

<sup>37</sup> We have modified our previous Order and notice to conform to the violations found.

Member Cohen does not pass on whether Burtch's 8(a)(5) statement was an additional violation of the Act. In this regard, he has substantial doubt as to the correctness of the majority's conclusion, and he notes that a finding of such a violation would not add significantly to the remedy.

4. Substitute the attached notice for that set forth in our underlying decision.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prematurely declare an impasse in collective-bargaining negotiations.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining representative of employees in the unit described below.

WE WILL NOT refuse to meet and bargain with the Union until the Union has dramatically altered its bargaining proposals.

WE WILL NOT accuse the Union of wasting our time during collective-bargaining negotiations.

WE WILL NOT unilaterally institute wage reductions for our employees or change their pension, health, insurance plans, and other benefits.

WE WILL NOT encourage our employees to bypass the Union by forming and assisting employee grievance committees.

WE WILL NOT on request fail to provide or delay in providing the Union with pension plan information regarding the terms and provisions of the plan and contributions made on behalf of the unit employees.

WE WILL NOT maintain portions of our employee manual that indicate that our severance benefits plan automatically excludes employees who are members of bargaining units.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody that understanding in a written, signed agreement. The bargaining unit is:

All hourly paid plant production and maintenance employees including janitors at our plants located at Trinity Avenue, South State Street and Utica Blvd., all in Lowville, New York; excluding office and clerical employees, technicians, guards (firemen-watchmen), foremen and all other supervisors as defined in the Act.

WE WILL restore and place in effect all terms and conditions of employment provided by the contract that expired on January 8, 1987, which we unilaterally changed, except in such cases in which the Union may request that a particular change not be revoked.

WE WILL make whole the unit employees for any loss of wages or other benefits they suffered by the implementation of our January 14, 1987 contract proposals or by the unilateral changes we made following our withdrawal of recognition from the Union.

WE WILL make contributions to any fund established by our collective-bargaining agreement with the Union which was in existence as of January 8, 1987, and which would have been paid but for the unlawful unilateral changes we made.

WE WILL, on request, furnish the Union with pension plan information regarding the terms and provisions of the plan and the contributions made to the plan on behalf of the unit employees.

WE WILL eliminate from our employee manual language indicating that employees who are members of bargaining units are automatically excluded from participation in our severance benefit plans.

A.M.F. BOWLING COMPANY, INC.